No. 11927

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

PATSY O'ROURKE KENDIG,

Appellant,

vs.

MARY BOONE KENDIG, and
UNITED STATES OF AMERICA,

Appellees.

Appeal from the United States District Court for the District of Arizona

Brief of Appellant

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IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

PATSY O'ROURKE KENDIG, a widow, *Appellant,* vs. MARY BOONE KENDIG, a widow, and UNITED STATES OF AMERICA, *Appellees.*	No. 11927

Brief of Appellant

In this brief, the parties will be referred to by their designations in the District Court, viz: Appellant as plaintiff and appellees as defendants.

References to the printed Transcript of Record will be indicated by the letter "T" followed by numerals denoting the page number.

This is an appeal from a judgment of the United States District Court, for the District of Arizona, giving judgment for defendants on directed verdict, where plaintiff was seeking to be declared the beneficiary of the National Service Life Insurance policy of her deceased husband.

JURISDICTION

Plaintiff filed with the Director of Insurance, Veterans Administration, her claim to recover as beneficiary under a National Service Life Insurance policy issued on the life of her deceased husband, Wiley So-Relle Kendig, pursuant to the provisions of the National Service Life Insurance Act of 1940, c. 757, Title VI, Part I, 54 Stat. 1014; 38 U.S.C.A. Ch. 13. (T-6).

Plaintiff's claim was denied thus causing a disagreement between plaintiff and the United States, and within sixty (60) days from the date of disallowance of her claim, plaintiff brought suit in the District Court of the United States for the District of Arizona, invoking the jurisdiction of said Court, pursuant to the provisions of c. 757, Title VI, Part I, par. 617, 54 Stat. 1014 as amended; 38 U.S.C.A. Sec. 817; and c. 320, par. 19, 43 Stat. 612 as amended; 38 U.S.C.A. Sec. 445. (T-7)

Trial of this matter was had, and on November 7, 1947, judgment for defendants on directed verdict was entered. (T-4, T-19, T-20)

On November 15, 1947 plaintiff filed Motion for a New Trial (T-4, T-22) which motion was denied on January 13, 1948. (T-5, T-23)

The judgment thereby became a final judgment and appeal therefrom to the Circuit Court of Appeals lies under c. 517, par. 6, 26 Stat. 828, as amended; 28 U.S.C.A. Sec. 225, the general statute on appeal, and within the time limit allowed by c. 517, par. 11, 26 Stat. 829, as amended; 28 U.S.C.A. Sec. 230. Notice of appeal was seasonably given and appeal bond filed. (T-23, T-24)

STATEMENT OF THE CASE

Wiley SoRelle Kendig enlisted in the United States Navy as an aviation cadet and shortly thereafter he was granted Ten Thousand ($10,000.00) Dollars National Service Life Insurance under policy N-5,004,911, effective August 21, 1941. (T-7, T-14)

Wiley SoRelle Kendig was unmarried at this time and his mother, the defendant Mary Boone Kendig, was designated as the beneficiary .(T-7, T-14)

Wiley SoRelle Kendig received his commission as a Navy officer and after some flying duty in the Caribbean area (T-36) he returned on leave to his home in Phoenix, Arizona and on November 29, 1943 he married Patsy O'Rourke, the plaintiff, whom he had known for some time before the war and who had been his sweetheart while both were attending college at Tempe, Arizona. (T-35, T-37)

After their marriage, Wiley SoRelle Kendig and Patsy O'Rourke Kendig went together to his station at Norfolk, Virginia and afterwards to his new station at Atlantic City, New Jersey. (T-37)

Less than four months after their marriage, Wiley SoRelle Kendig was killed in an airplane crash near Tucahoe, New Jersey, on March 23, 1944. (T-42) Subsequent to the death of Wiley SoRelle Kendig, a son was born as issue of the marriage of Wiley SoRelle Kendig and Patsy O'Rourke Kendig. (T-8, T-11)

Shortly before his death, Wiley SoRelle Kendig had told Patsy O'Rourke Kendig that he had changed the beneficiary of his life insurance (T-40) and two days after his death she saw a confidential report dated February 5, 1944 and signed by Wiley SoRelle Kendig

which was shown to her by his squadron commander, in which she was name as beneficiary of his government insurance. (T-43, T-97)

On April 5, 1944, the defendant, Mary Boone Kendig filed her claim with the Veterans Administration for the benefits of the National Service Life Insurance of Wiley SoRelle Kendig. On March 17, 1945 she was awarded the benefits thereof, effective March 23, 1944 and this award was suspended September 13, 1945. (T-14)

On July 18, 1944 the plaintiff, Patsy O'Rourke Kendig, filed her claim as widow of Wiley SoRelle Kendig for the benefits of his policy of insurance. She was notified by the Veterans Administration on March 27, 1946 that her claim was denied. (T-14)

Plaintiff, Patsy O'Rourke Kendig, filed with the United States District Court her complaint seeking to be declared beneficiary of the insurance policy of her deceased husband, Wiley SoRelle Kendig, on May 15, 1946. (T-9)

Mary Boone Kendig and the United States of America each filed an answer (T-10, T-13) and the cause came up for trial on October 28, 1947 . (T-16)

At said trial, plaintiff introduced evidence to show that Wiley SoRelle Kendig had made her the beneficiary of his National Service Life Insurance. Plaintiff testified that Wiley SoRelle Kendig, shortly prior to his death, told her that he had made the change of beneficiary. (T-40, T-79, T-90, T-91) Plaintiff also testified that about two days after the death of her husband, Wiley SoRelle Kendig, she was discussing mat-

ters with Commander Vorse, her husband's commanding officer, and in answer to her question as to whether the government insurance was complete, Commander Vorse showed her a confidential report for the government files, dated February 5, 1944, signed by Wiley SoRelle Kendig, in which he said he had $10,000 of government insurance, beneficiary was his wife, and policy was located at Phoenix, Arizona, with his mother. (T-43, T-96, T-97) Plaintiff then offered the deposition of George Kendig, the brother of Wiley SoRelle Kendig, and George Kendig testified that only a few days before his death, Wiley SoRelle Kendig said that he had sent in a form to change the beneficiary on his government insurance from his mother, Mary Boone Kendig, to his wife, Patsy O'Rourke Kendig. (T-50, T-56, T-58, T-59, T-69) Plaintiff further offered as evidence the testimony of one Ralph E. Palmer concerning the state of the files of the Veterans Administration in Washington, but this testimony was excluded by the court. (T-99)

Plaintiff then rested her case and thereafter on motion of the defendant, Mary Boone Kendig, the court directed the jury to return a verdict for the defendants on the ground the plaintiff had not made out a case to show that Wiley SoRelle Kendig had changed his beneficiary from his mother to his wife. (T-19, T-20, T-103)

Thereupon, plaintiff filed a motion for a new trial, (T-22) which motion was denied January 13, 1948 (T-23) and plaintiff has now appealed to this court Order denying plaintiff's motion for a new trial. (T-23) from the Judgment on Directed Verdict and from the

SPECIFICATIONS OF ERRORS

I

The District Court erred in refusing to admit the testimony of Ralph E. Palmer. The grounds urged at the trial for the objection to the evidence was as follows:

> "Q. During your time there in Washington, did you have any occasion to observe the condition of the files and the records of the various policyholders of this National Service Life Insurance?
>
> Mr. McAlister: Just a minute. I object to that as it has no particular bearing on the case here, no showing that any change of beneficiary had ever reached Washington as the rest of them did. I don't see that there is any materiality to the testimony of Mr. Palmer here at all.
>
> Mr. Linton: Your Honor, it is our contention that the evidence shows that such change was sent in, and our intention, honestly, in producing this witness, is to show that some state of confusion existed in Washington.
>
> The Court: It always exists in Washington.
>
> Mr. Linton: To check some eighteen million policyholders overnight.
>
> The Court: I do not think it is proper." (T-99)

The substance of the evidence which was not admitted was that Ralph E. Palmer would have testified to the state of confusion that existed in the Veterans Administration in the handling of government insurance policies and correspondence because of the tremendous volume of work being handled, and that on some occasions forms and correspondence pertaining to such insurance were lost or misfiled.

II

The District Court erred in granting defendant's motion to direct the jury to return a verdict for the defendants, set forth in the record as follows:

"Mr. Cunningham: If the Court please, for the purpose of the record, may I be permitted to enlarge the motion I made yesterday that the action be dismissed so as to include that the jury be instructed—

The Court: Directed to return a verdict?

Mr. Cunningham: Yes.

The Court: All right. I think the motion should be granted. I don't think the plaintiff has made out a case, so if you will prepare the verdict, I will appoint Mr. Goldwater foreman and ask him to sign it." (T-103)

for the reason that there was sufficient evidence offered by plaintiff to require submitting the case to the jury on the question of whether or not Wiley SoRelle Kendig had changed the beneficiary of his National Service Life Insurance from his mother, Mary Boone Kendig, to his wife, Patsy O'Rourke Kendig.

ARGUMENT

I

Considering first Specification of Error number I, directed to the refusal of the District Court to admit testimony of Ralph E. Palmer (T-99) concerning certain confusion in the Veterans Administration in the handling of forms and correspondence, it is plaintiff's contention that this testimony should have been admitted. Plaintiff had introduced evidence to the effect that Wiley SoRelle Kendig had sent in a form to

change his beneficiary from his mother to his wife. (T-58, T-69) Since the Veterans Administration denies having in its files a change of beneficiary from Wiley SoRelle Kendig, this testimony was offered to explain why it might not be in said files by showing that there was confusion in the Veterans Administration because of the great amount of work being handled, and that on occasions forms and correspondence relating to insurance were lost or misfiled by the Veterans Administration.

In the case of

Gann v. Meek
Fifth Circuit
165 Fed. (2d) 857

where there was evidence by a letter from the deceased marine that he had changed his insurance, the court admitted testimony by a marine who had served in the same general area, but not in the same company or division, at about the time decedent was killed, to the effect that mails were irregular and frequently lost. The court went on to say at 165 Fed. (2d) 858:

> "Moreover, it was a well known fact that, during this period, mail piled up in the offices of the Veterans Administration at Washington until months elapsed before requested changes of beneficiaries were made, and during the interim period many letters were either misplaced or lost."

In the case of

Rutledge v. United States
D.C.W.D. Louisiana
72 Fed. Sup. 352, 357

the court said, in referring to conditions prevalent in processing men for overseas duty:

> "It is easy to understand the confusion and probability of mistakes, omissions, and misplacing of

documents and records in such circumstances."

In the case of

Roberts v. United States
Fourth Circuit
157 Fed. (2d) 906, 909
Cert. denied
330 U. S. 829
67 Sup. Ct. 870

the Court said:

"* * * failure of the change of beneficiary to reach its destination is easily understood when one considers the volume of business transacted at military posts and the character of the administrative organization thrown together to meet the emergency of war."

It may be that even without the offering of evidence as to the condition of the records of the Veterans Administration, the Court could take judicial notice of the conditions prevalent therein at the time, as the court in Gann v. Meek, supra, Rutledge v. United States, supra, and Roberts v. United States, supra, seemed to do, and as the District Court in the present case indicated in saying "It (confusion) always exists in Washington." (T-99)

II

We next consider Specification of Error number II, directed to the granting by the District Court of defendant's motion for a directed verdict.

It is plaintiff's earnest contention that sufficient evidence was offered at least to require submission to the jury the question of whether or not Wiley SoRelle Kendig changed the beneficiary of his Government Insurance from his mother to his wife, and plaintiff further contends that probably the evidence was suf-

ficient to require a finding that he had thus changed the beneficiary.

The pertinent portion of the statute involving changes of beneficiaries of National Service Life Insurance reads as follows:

> "* * * The insured shall have the right to designate the beneficiary or beneficiaries of the insurance, * * * and shall, subject to regulations, at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries * * *."
>
> c. 757, Title VI, Part I, par. 602
> 54 Stat. 1009, as amended;
> 38 U.S.C.A. Sec. 802 (g)

The pertinent portions of the applicable regulation of the Veterans Administration reads as follows:

> "* * * A change of beneficiary to be effective must be made by notice in writing signed by the insured and forwarded to the Veterans Administration by the insured or his agent, and containing sufficient information to identify the insured. Whenever practicable such notices shall be given on blanks prescribed by the Veterans Administration. Upon receipt by the Veterans Administration, a valid designation or change of beneficiary shall be deemed to be effective as of the date of execution * * *."
>
> Regs. Oct. 16, 1942
> 7 Fed. Reg. 8363
> Par. 10.3447

The cases arising under this statute and regulation have in their language and holdings been clear that there would not be strict adherence to the manner of changing a beneficiary as set forth in the regulation.

As the court said in the case of

Rutledge v. United States
D.C.W.D. Louisiana
72 Fed. Sup. 352, 357

"It is the duty of the courts to give effect to the wishes and intentions of the men in the service, if it is reasonably possible to ascertain them from the available evidence, which they leave behind when giving their lives in defense of their country. It is not required that the rigid forms of ordinary life insurance be followed but sufficient if the intention is made certain and affirmative action taken to express it."

In the case of

Collins v. United States
Tenth Circuit
161 Fed. (2d) 64, 69
Cert. denied
331 U. S. 859
67 Sup. Ct. 1756

the Court said:

"As pointed out, attempts by an insured to change the beneficiary will be liberally construed if the intent to effect the change is clear and reasonable steps are taken by the insured to bring about such a change. In such a case, technicalities will not be permitted to thwart the express desire of the insured, and a court of equity will treat as done that which ought to be done. * * * In view of all this, it is unreasonable to conclude that the government intended to encircle the right to change the beneficiary with technicalities and make such a a change difficult of accomplishment. It is more reasonable to assume that all the government intended to require was satisfactory evidence showing positive action on his part to effectuate such intent, and that when once this is shown, legal

technicalities relating to ministerial acts or perfunctory acts will be brushed aside in order to carry out the expressed will and intent of the insured soldier."

The case of

Johnson v. White
Eighth Circuit
39 Fed. (2d) 793

was decided under the statutes pertaining to changes of beneficiaries of government insurance during the first World War and subsequent thereto. However, the statutes were almost identical to those in effect in 1944, which pertain to the present case. The court in the Johnson case, at 39 Fed. (2d) 796, said:

"The intention, desire, and purpose of this soldier should, if it can reasonably be done be given effect by the courts, and substance, rather than form, should be the basis of the decisions of courts of equity. The clearly expressed intention and purpose of the deceased to have his wife named as the beneficiary in this insurance should control, and should not be thwarted by the fact that all the formalities for making this purpose effective may not have been complied with."

And at 39 Fed. (2d) 797, the Court said:

"Great latitude should be allowed in order to gives effect to the acts and intentions of those in military service in time of war. This has become a public policy of practically every state of the union where statutes will be found making specific provision for nuncupative wills by soldiers or sailors in time of war, and the tendency of the courts is, and should be, to treat the soldiers in such matters with peculiar indulgence."

There are numerous other cases expressing the same view that all that is necessary to change beneficiaries

is for the soldier to express clearly his intent that there be a change and to take some affirmative action to effectuate this intent.

Roberts v. United States
Fourth Circuit
157 Fed. (2d) 906
Cert. denied 330 U.S. 829
67 Sup. Ct. 870

Bradley v. United States
Tenth Circuit
143 Fed. (2d) 573
Cert. denied 323 U.S. 793
65 Sup. Ct. 429

Claffy v. Forbes
280 Fed. 233

Egleston v. United States
71 Fed. Sup. 114

Woods v. United States
69 Fed. Sup. 760

Citron v. United States
69 Fed. Sup. 830

Mitchell v. United States
Fifth Circuit
165 Fed. (2d) 758

McKewen v. McKewen
Fifth Circuit
165 Fed. (2d) 761

Gann v. Meek
Fifth Circuit
165 Fed. (2d) 857

According to Mitchell v. United States, supra, the cases are unanimous that where government insurance is concerned and a change of beneficiary is involved, the courts will, in order to carry out the intent of the insured, sweep aside all legal technicalities.

Since there seems to be unanimity among the cases as to the law involved, the place where the courts differ, after intent to change has been shown, is as to the degree of affirmative action needed to carry out the intent and to effect a change.

It is our purpose to go into the fairly recent cases on this point to ascertain what these cases considered necessary as to intent for a change and the affirmative action needed to effectuate this intent, and compare these cases with the present case now on appeal.

In the present case, the following evidence was presented:

The plaintiff testified that her husband, Wiley SoRelle Kendig, told her when they were nearly ready to be transferred that he had to get his papers "all cleared up" before he went out. (T-38) Later in January 1944 he had a crash and about a week later he made the statement again and said that it could happen to him. (T-38, T-39) Then about the middle of February, 1944, in the presence of a witness (T-79), Wiley SoRelle Kendig told his wife that he had changed the beneficiary of his government insurance and everything was settled. (T-40)

On March 25, 1944, two days after her husband was killed, plaintiff was discussing his affairs with his Commanding Officer, Commander Vorse. She asked what condition his life insurance was in. Commander Vorse showed to her a confidential report from the squadron files, signed by Wiley SoRelle Kendig, dated February 5, 1944, in which Wiley SoRelle Kendig stated that he had government insurance in the sum of $10,000, that the beneficiary was his wife, and that the

policy was located at Phoenix, Arizona with Mrs. Mary Kendig. (T-42, T-44, T-96, T-97)

Plaintiff also offered in evidence the deposition of George Kendig, brother of Wiley SoRelle Kendig, and son of defendant, Mary Boone Kendig. George Kendig testified that in 1944, shortly before his brother's death, he had spent a day with his brother in Atlantic City. (T-49) During the course of their conversation, Wiley SoRelle Kendig told George Kendig that he had sent in a form to change the beneficiary on his government insurance from his mother, Mary Boone Kendig to his wife, Patsy O'Rourke Kendig. (T-50, T-56, T-58, T-59, T-69)

Plaintiff also introduced as Plaintiff's Exhibit 2 in Evidence the affidavit of George Kendig, dated September 25, 1945, in which George Kendig on oath stated that Wiley SoRelle Kendig on March 18, 1944, said that he had sent in a form to the Veterans Administration asking that the beneficiary on his government insurance policy be changed from their mother, Mary Boone Kendig, to his wife, Patricia O'Rourke Kendig. (T-93, T-94)

Although no request for change of beneficiary sent in by Wiley SoRelle Kendig was found in the files of the Veterans Administration, plaintiff contends that there was sufficient evidence of a change of beneficiary so that the jury should not have been directed to return a verdict for defendants.

The jury could reasonably have found from the evidence that Wiley SoRelle Kendig sent a form to the Veterans Administration requesting that the beneficiary of his government insurance be changed from his

mother to his wife, but that somewhere this request was misplaced or lost.

The testimony of the plaintiff that Wiley SoRelle Kendig told her he had changed the beneficiary is amply corroborated by the testimony of George Kendig, brother of the decedent. George Kendig is not interested in the outcome of this lawsuit. (T-72) In effect, when he testified as to what Wiley SoRelle Kendig had said, he was testifying against the interest of his own mother, the defendant, Mary Boone Kendig. Yet in order to help effectuate the expressed desire of his brother, Wiley SoRelle Kendig, to change beneficiaries, George Kendig did make an affidavit as to his brother's statements and further submitted to the taking of a deposition. The very facts surrounding his relationship to the parties to this action is strong circumstantial evidence as to the truth of his statements.

A further corrboration of Wiley SoRelle Kendig's statement that he had sent in a change of beneficiary is the confidential statement signed by him and kept in the files of his squadron. In this statement he had written that his wife was his beneficiary. This certainly could be interpreted to mean, and is strong evidence when taken with his statements to his wife and to his brother, that he had indeed sent in a form to the Veterans Administration to change beneficiaries from his mother to his wife.

The circumstances surrounding his statements to his wife and to his brother, the signed confidential statement plus the natural inclination of a man to provide for his wife, especially in view of the narrow escape he had had in January 1944, all lend credence to the evidence that he had sent in a change of beneficiary to the Veterans Administration.

Plaintiff believes that a jury could and would reasonably have found that such a change was sent in, and this being so, it was error to direct a verdict for defendants.

The recent cases have almost uniformly upheld the claim of the wife to be declared beneficiary, and in several of these cases, the evidence has been similar to the evidence presented in the present case.

In the case of

Mitchell v. United States
Fifth Circuit
165 Fed. (2d) 758

the facts were like those in the present case. The soldier at the time of taking out insurance was unmarried and named his mother his beneficiary. Subsequently he married plaintiff and after his death the Veterans Administration decided he had never changed beneficiaries. The evidence introduced by the wife to show that he had changed the beneficiary on his insurance to her was very similar to the evidence in the present case. There was testimony by the wife that he told her he was taking out a policy in her name and later asking her if she had received the papers. There was a copy of a Government Insurance Report Form in which the wife was named as beneficiary, the original apparently having been lost, and there was testimony by an officer friend of the decedent to the effect that decedent had said he had changed the beneficiary from his mother to his wife. The Circuit Court upheld judgment for the wife as given by the district court, reported as Rutledge v. United States, 72 Fed. Sup. 352.

The Circuit Court found that decedent had intended to change beneficiaries and had done so. The filling out of the insurance report form strongly corroborated

the testimony of the wife. The decedent intended that his wife should be his beneficiary and thought that he had made her such. The fact that no actual change of beneficiary, nor even the insurance report form was in the government files was held not to be controlling and did not mean that no change was effectuated. Since the original insurance report form was lost by the government, other papers such as the change of beneficiary might also have been lost.

> The Court at 165 Fed. (2d) 761 went on to say: "These insurances cases are difficult of decision. Each must be decided in the light of its own facts. The strict law is that a change of beneficiary must be made in writing and in proper form. Where this has not been done, the courts will brush aside technicalities to give effect to the intention of the insured. It is said that a combination of intent and act is required, but to say in these insurance cases that though intention to change the beneficiary is proved to the hilt, no effective formal act having been done no change can be held to have been made, is not to brush technicalities very far aside. If a man possessing the degree of literacy required of an officer in the United States Army Air Corps writes, "I have taken out insurance and I have made you the beneficiary" surely it is subserving technicality to say that this is not sufficient evidence of an exercise of his right to change. True, it is not an actual change but it is strong, almost incontrovertible, *evidence* of a change.
>
> In the case at bar the facts in combination lead irresistibly to the conclusion that the insured, Hardwick, not only intended to make his wife the beneficiary of his insurance, but had also affirmatively acted to make her such."

Plaintiff earnestly submits that where the court on the facts and evidence in the Mitchell case was ir-

resistibly led to find that decedent had acted to make a change, certainly in the present case the jury could reasonably have found from the evidence that Wiley SoRelle Kendig had affirmatively acted to change beneficiaries from his mother to his wife.

In the case of

McKewen v. McKewen, et al.
Fifth Circuit
165 Fed. (2d) 761

the question was again between the wife and the mother as to whether the beneficiary had been changed. The evidence presented by the wife, to show that her husband had changed the beneficiary of his government insurance from his mother to her, was three documents: an officer's data sheet, a government insurance report form and another form similar to the data sheet. On each of these he merely said that his wife was the beneficiary. Nowhere did there seem to be any written request to the Veterans Administration nor did decedent say in so many words to anyone that he had changed his beneficiary.

The court, however, indicated that in view of decedent's statements in these documents, it would be looking at form and overlooking substance to say that there was no statement to indicate he had changed the beneficiary.

The court upheld the judgment of the district court for the wife, saying at 165 Fed. (2d) 765, 766:

> "Surely the three official documents signed by the deceased at two different times and places, wherein he stated that his wife was the beneficiary, constituted substantial evidence justifying the Court below in drawing the inference that the insured had done all that he deemed necessary in

order to make his wife—to whom he owed the legal obligation of furnishing support—the beneficiary of his insurance."

Plaintiff believes that the evidence presented in the present case is fully as strong, if not stronger, than the evidence in the McKewen case as to change of beneficiary.

In the present case, not only was there the statement on a government form that his wife was his beneficiary, but Wiley SoRelle Kendig in addition made statements that he had changed his beneficiary.

If in the McKewen case there was substantial evidence to uphold a judgment for the wife, certainly in the present case the jury could reasonably have found that Wiley SoRelle Kendig had changed the beneficiary of his government insurance from his mother to his wife and where a jury could reasonably have so found, it was error to direct a verdict for the defendant.

The case of

Gann v. Meek
Fifth Circuit
165 Fed. (2d) 857

was between the wife, who was named as beneficiary, and the mother who claimed that decedent had changed the beneficiary from the wife to the mother. The evidence submitted here was a letter written by decedent to his brother in which he said that he had changed his insurance and if anyone gets it his mother would, and the testimony of a marine from a different command, but from somewhat the same area as that in which decedent was killed, that mail was frequently lost. The court also seemed to take judicial notice of the fact that Veterans Administration was swamped with work and many letters were misplaced or lost.

The Circuit Court upheld the judgment of the trial court that the beneficiary had been changed, and at 165 Fed. (2d) 858, 859 said:

> "Certainly the evidence presented, when viewed in the light of facts constituting common knowledge, made a jury question as to whether Ervin had done all he reasonably could to effect a change of beneficiary. From this evidence the jury could reasonably have inferred that Corporal Ervin did request the Veterans Administration to change his beneficiary from his wife back to his mother, and that his letter of request was lost * * *."

Surely the evidence presented in the present case as to the change of beneficiary by Wiley SoRelle Kendig, is stronger than the evidence presented in the Gann case.

In the present case, not only should the plaintiff have been permitted to get in evidence as to the conditions of the files of the Veterans Administration, but the court could have taken judicial notice of this as common knowledge. In addition, in the present case, Wiley SoRelle Kendig not only named his wife as his beneficiary in the confidential report, but he also told his wife he had changed beneficiaries, and also told his brother, a completely reliable witness in view of the circumstances, that he had sent in a form to the Veterans Administration to change beneficiaries.

If a jury could find, and did find, in the Gann case that the beneficiary had been changed, how much more easily and reasonably it could have found a change of beneficiary in the present case! It was, therefore, error to direct a verdict on the grounds of insufficient evidence.

We consider now the case of

Shapiro v. United States
Second Circuit
166 Fed. (2d) 240

which involved the question of a change of beneficiary from the mother to the wife. Evidence was introduced on behalf of the wife to the effect that the decedent had filled out a government form entitled "Designation of Beneficiary" which did not mention insurance, but merely said his wife was primary beneficiary and his mother alternate beneficiary. This form was sent to the War Department and not to the Veterans Administration. Evidence was also offered by testimony that decedent intended to change beneficiaries by the execution of this form, and that he said that he had changed beneficiaries. The district court found that decedent had changed beneficiaries, and on appeal by the mother, the Circuit Court upheld the trial court on the grounds that the findings were supported by substantial evidence and the court went on to say at page 241, supra,

"the judgment rendered was not only justified but required by the proof." (Emphasis supplied)

Thus, in this case, if there had been a jury, there should have been a directed verdict that decedent had changed the beneficiary of his insurance!

It should be noted also that the court in the Shapiro case is not requiring evidence to the effect that a form to change beneficiaries had been sent in the Veterans Administration. By the testimony in this case, the decedent had never intended to send such a form to the Veterans Administration, but simply intended that the designation of beneficiary act as a change, even though neither insurance nor change was mentioned on this designation. All the Court seems to require is that

the decedent have intended to change beneficiaries and that he have done some act to effectuate his intent.

Applying this line of thought to the present case, the jury could reasonably have found that Wiley SoRelle Kendig intended to change beneficiaries and that the execution of the confidential report naming his wife as beneficiary was the act effectuating this intent.

Another fact should be noted in the Shapiro case. The court commented on the case of

Bradley v. United States
Tenth Circuit
143 Fed. (2d) 573
Cert. denied 323 U.S. 793
65 Sup. Ct. 429

which was a case heavily relied on by defendants at the trial of the present case, and where the majority of the court had held that a confidential report naming the wife as beneficiary was not an act which would effectuate his intention to change beneficiaries, because the report did not express a desire or intent that the beneficiary be changed and was not a direction that the beneficiary be changed. There was a dissent by Judge Phillips, who would have affirmed the judgment of the District Court and held that the execution of the statement was a sufficient act to effectuate the intention to change.

The court in the Shapiro case indicated that each case dealt with the question of whether or not the evidence showed that the decedent had intended to change beneficiaries and had acted to effectuate his intention, and said that if its conclusion differed from the Bradley case as to the law, then the conclusion reached by Judge Phillips in his dissenting opinion

would accord with its own view as to what the proper decision should be.

This is a strong dictum to the effect that a statement of intention to change beneficiaries and the act of naming his wife on a confidential report would be sufficient to support a finding that beneficiaries had been changed.

A case with that factual situation would be weaker than the present case, and therefore a jury could easily and reasonably have found that Wiley SoRelle Kendig had changed beneficiaries from his mother to his wife, and a verdict should not have been directed on the grounds that this was insufficient evidence of a change.

We would like briefly to call attention to the case of

Van Doren v. United States
D.C.S.D. Calif.
68 Fed. Sup. 222

in which the only evidence presented was an army form for designating a beneficiary, which was in the files of the War Department and not addressed to the Veterans Administration. There was no evidence offered as to the soldier's intention. Yet the court held that the instrument spoke for itself, required no explanation of its meaning, and was enough to uphold a finding of a change of beneficiaries. The court commented that it would be strange to deny the change because the instrument was in the files of the War Department and not in those of the Veterans Administration.

The present case is immeasurably stronger because of the expression by Wiley SoRelle Kendig of intent to change and his statements that he had changed beneficiaries.

We wish to refer to the case of

Roberts v. United States
Fourth Circuit
157 Fd. (2d) 906
Cert. denied 330 U.S. 829
67 Sup. Ct. 870

wherein the evidence introduced to show a change of beneficiary consisted of testimony that the deceased and another officer had made a specific trip to change beneficiaries of insurance and other government benefits. No designation of change of beneficiary of insurance was found in the files of the Veterans Administration, but a confidential report filed with his Navy Unit did state that his wife was his insurance beneficiary, and the beneficiary of his bonus. There was some opposing testimony to the effect decedent had said his parents would be taken care of. The District Court held there had been no change of beneficiary, but the Circuit Court reversed the trial court and remanded with orders that it be found that the beneficiary had been changed. Thus, in effect, a verdict should have been directed for the wife.

Certainly if the evidence in the Roberts case warrants a directed verdict for the wife on the grounds the beneficiary had been changed, the evidence in the present case is easily sufficient for the matter to go to the jury on the question of whether or not the beneficiary of his insurance was changed by Wiley SoRelle Kendig.

We also wish to cite several cases from the District Courts which seem to bear up the contention of the plaintiff herein that the present case should have gone to the jury on the question of whether or not Wiley

SoRelle Kendig changed the beneficiary of his government insurance from his mother to his wife.

Rutledge v. United States
D.C.W.D. Louisiana
72 Fed. Sup. 352

Egleston v. United States
D.C.E.D. Illinois
71 Fed. Sup. 114

Walker v. United States
D.C.S.D. Texas
70 Fed. Sup. 422

Citron v. United States
D.C.D.C.
69 Fed. Sup. 830

Woods v. United States
D.C.M.D. Alabama
69 Fed. Sup. 760

In conclusion, plaintiff sincerely submits to the Court that sufficient evidence was introduced at the trial of this matter so that the question of whether or not Wiley SoRelle Kendig changed beneficiaries of his government insurance should have been submitted to the jury, and it was error to direct a verdict on the grounds of insufficient evidence.

Even without the testimony of Ralph E. Palmer, there was sufficient evidence to go to the jury, and with such evidence admitted, or the court's taking judicial notice of the confusion existing in the government records at that time, the case for the jury is that much stronger.

All the probabilities are in favor of the evidence that the beneficiary was changed. It is the normal and expected action that a husband should make his wife his

beneficiary in order to protect her and his unborn child. It is to be expected that a narrow escape in a crash (T-38) would cause him to think of what might happen and then take steps to protect his dependants. Prior to this crash he had expressed the intention to change (T-38). Afterwards, he said he had changed beneficiaries (T-40). About a month later, he told his brother, George Kendig, that he had sent in a form to change beneficiaries (T-58). The use of the term "I sent" certainly implies that he had taken affirmative action to change beneficiaries; it means more than an intent to change.

Because of the circumstances here in speaking against what appears to be the interests of his own mother, in order to tell of the desire of his brother, the testimony of George Kendig deserves great weight.

A further corroboration is the signed statement in the confidential report from the Government files, (T-96-97), which said that his wife was the beneficiary of his government insurance. This confidential report certainly would indicate that he thought his wife was his beneficiary and thus strong corroboration of the statement to his brother that he had sent in a form to change beneficiaries.

It is also plaintiff's contention, as an alternative, that the statement in the confidential report, along with his expressed intention to change beneficiaries, is enough affirmative action so that it could be found that a change of beneficiaries had been made, even though he had sent no form to the Veterans Administration.

As mentioned in Johnson v. White, supra, Claffy v. Forbes, supra, and Walker v. United States, supra, it has long been a policy of the courts to treat with great

liberality the expressed intention of a soldier killed in the service of his country, so as to effectuate his intentions. The trend of the decisions shows that the cases are becoming less and less technical as to the form that must be complied with in order to effectuate the soldier's intentions, and this is rightly so.

Plaintiff respectfully submits that there was no doubt that her husband, Wiley SoRelle Kendig, wanted and intended that she should be the beneficiary of his insurance, and that he took sufficient affirmative action to express and effectuate his intent, so that the matter should have been submitted to the jury as to whether or not he did change beneficiaries.

Plaintiff therefore, respectfully asks, that if it is not found as a matter of law that the beneficiaries had been changed, that this matter be remanded to the District Court for a new trial.

Respectfully submitted,

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